

FILED
U.S. CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

1 2005 JAN 18 P 1:02

HOSTAR MARINE TRANSPORT SYSTEMS, INC.

Plaintiffs,

v.

U.S. DISTRICT COURT
DISTRICT OF MASS.

RECEIPT # 61507
AMOUNT \$ 1504
SUMMONS ISSUED X-5
LOCAL RULE 4.1
WAIVER FORM
NOT ISSUED
EXEMPT CLERK M
1-18-05

UNITED STATES OF AMERICA
Defendants

05 10111 DPW

COMPLAINT

MAGISTRATE JUDGE Dein

Now comes the Plaintiff, Hostar Marine Transport Systems, Inc. and complains of the Defendant, United States of America as follows.

JURISDICTION

This cause of action is based upon 26 USCA §7422 (a) which provides for actions by taxpayers for the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected and that the jurisdiction of the Court is based upon 28 USCA §§ 1340, 1346(a)(1), which provide that the District Court shall have original jurisdiction of any civil action arising under any act of Congress providing for Internal Revenue and for the recovery of any Internal Revenue tax alleged to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected.

PARTIES

1. The Plaintiff, Hostar Marine Transport Systems, Inc. is Massachusetts corporation with its principal office at One Kendrick Rd, Wareham, MA.

2. The Defendant is the United States of America.

Facts

3. The Plaintiff, Hostar Marine Transport System, Inc. ("Hostar") has been erroneously assessed excise tax pursuant to IRC §4061(a) (the "Excise Tax") .

4. Hostar is a manufacturer of hydraulic boat trailers ("hydraulic boat trailers") for use in marinas, boat yards. Hostar's hydraulic boat trailers are used by restorers, dealers and manufacturers.

5. Hydraulic boat trailers are designed to launch and retrieve boats from the water, to move boats into and out of repair facilities and paint booths, to move them about a boat yard, yacht club, marina or boat dealership, and to set boats on keel blocking and boat stands for winter storage.

6. Hydraulic boat trailers can only function because of their completely open-center design, a "wishbone" or "tuning fork" type of trailer, having no permanently welded cross beams and stub axles.

7. Stub axles attach a single wheel to the trailer as opposed to the more common through axles which attach two wheels.

8. Through axles are used on highway transport trailers.

9. Hydraulic trailers are constructed with stub axles mounted under or outboard of the trailer frame. This design enables the operations of ramp launching, retrieving, setting a boat on the ground or in a repair facility or storage building.

10. The main function or purpose of a hydraulic trailer is not that of highway transporting.

11. Almost all highway transporting of boats is done on lowboy trailers which are similar to trailers for moving construction equipment. Lowboy trailers have through axles and a full bed or welded cross beams, are not submersible and have no hydraulic power units, pumps, cylinders and controls.

12. Boat manufacturing companies use lowboy types of trailers for the transportation of boats to boat dealers.

13. Hostar does not build lowboy trailers.

14. Hostar manufactures four model's of trailers HPT, HST, HSTY, HILT. Model's HPT, HST & LINT are capable off on road use. The HSTY is incapable of road use.

15. A hydraulic boat trailer is equipment, similar to a marine hoist, in a boatyard. The expense of its hydraulic pumps, motors, controls, cylinders, special axles, etc. and the resulting costs to maintain them make Hostar's trailers economically unfeasible for hauling boats when compared to the lowboy trailers.

16. IRC Section 4051 (a) (1) imposes a 12 percent excise tax on the first retail sale of certain articles including automobile truck chassis and bodies.

17. Section 145.4051-1(a) (2) of the Temporary Excise Tax Regulations provides that a chassis or body is taxable under section 4051 (a) (1) only if such chassis or body is sold for use as a component part of a highway vehicle (as described in section 48.4061(a)-1(d) of the Manufacturers and Retailers Excise Tax Regulations).

18. Regulation 48.4061(a)-1(d) (1) defines a "highway vehicle" as any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other a special permit for highway use, is overweight, overheight or overwidth for regular use, and any other relevant considerations. Solely for purposes of determinations under this paragraph (d) (2) (ii), where there is affixed to the vehicle equipment used for loading, unloading, storing, vending, handling, processing, preserving, or otherwise caring for a load transported by the vehicle over the public highways, the functions are related to the transportation of a load over the public highways even though such functions may be performed off the public highways.

19. Regulation 48.4061 (d)(2)(i) Exempts Hostar's Hydraulic Boat Trailers from the Imposition of Excise Tax.

20. Regulation 48.4061(d)(2)(i) ("Regulation i") exempts from taxation a trailer (or chassis) if (A) machinery or equipment has been affixed to perform a function unrelated to transportation on or off the public highways, (B) the chassis has been specially designed to serve only as a mobile carriage and mount for the particular equipment involved and (C) is of a special design where it could not be used to transport any load other than that particular machinery or equipment or similar machinery or equipment requiring such a specially designed chassis.

21. The first test of the regulation is that machinery or equipment be affixed to the trailer to perform a function unrelated to transportation on or off the highway.

22. Hostar's Hydraulic Boat Trailers are designed to launch and retrieve boats from the water, to move boats into and out of repair facilities and paint booths, to move them about the boat yard, yacht club, marina or boat dealership, and to set the on keel blocking and boat stands for winter storage. The trailer's have hydraulic power units, pumps, cylinders and controls.

23. Hostar's Hydraulic Boat Trailers meet the first test established by Regulation i.

24. The second and third tests of Regulation i require that the trailers be specially designed to serve only as a mobile carriage for the particular equipment involved and cannot be used to transport any load other than that particular equipment.

25. Rev. Rul. 79-423, 1979-2 C.B. 386, states that a chassis meets the part (C) test of section 48.4061(a)-1(d) (2) (i) if it has been specially designed to hold certain jobsite machinery or equipment, to the extent that it is substantially structurally different than a chassis that would ordinarily be used for transporting a load other than that particular machinery or equipment or similar machinery or equipment requiring such a specially designed chassis.

26. Hostar's Hydraulic Boat Trailers are specially designed to be a mobile carriage for boats and cannot be used to transport equipment other than boats.

27. Hostar's Hydraulic Boat Trailers meet the second test of Regulation i.

28. Regulation 48.4061(d)(2)(ii) Exempts Hostar's Trailers from the Imposition of Excise Tax.

29. Regulation 48.4061(d)(2)(ii) ("Regulation ii") states that a trailer (or chassis) is not a highway vehicle if it is (A) specially designed for the primary function of transporting a particular type of load other than over the public highway and (B) if by reason of such special design, the use of such vehicle

to transport such load over the public highways is substantially limited or substantially impaired.

30. The primary fuction of Hostar's Hydraulic Boat Trailers is for use in boat yards and rarely on the highway to their cost and highly specialized equipment.

31. On or about May 18, 2000 Hostar was assessed additional tax pursuant to IRC Section 4051 for tax periods ended: March 1994, June 1994, June 1995, September 1995, December 1995, March 1996, June 1996, September 1996 and December 1996.

32. On or about January 1, 2001 the Internal Revenue Service applied Hostar's overpayment credit in the amount of \$215.20 to the additional tax assessed pursuant to IRC Section 4051 for tax period ended June 1994.

33. On or about July 31, 2001 the Internal Revenue Service applied Hostar's overpayment credit in the amount of \$55.91 additional tax assessed pursuant to IRC Section 4051 for tax period ended March 1994 making the total for the two tax periods \$271.11.

34. On or about January 16, 2003 the Internal Revenue Service denied Hostar's claim for adjustment to tax and notified same of its right to file suit in the United States District Court (Please See Exhibit 1).

COUNT I
(Erroneous Assessment)

35. The Plaintiff realleges the allegations of paragraphs

1 through 34 of its complaint as fully set herein.

36. Hostar's Hydraulic Boat Trailers are exempted from Excise Tax pursuant to Regulation 48.4061(d)(2)(i).

37. Hostar's Hydraulic Boat Trailers are exempted from Excise Tax pursuant to Regulation 48.4061(d)(2)(ii).

WHEREFORE, the forgoing reasons, the Plaintiff prays this honorable Court for:

- a. Judgment against the Defendant, United States of America, in the amount of \$271.11 plus statutory interest and an abatement of the assessment against them; and,
- b. Any and all other remedies that this honorable Court deems appropriate.

COUNT II
(Violation of Due Process)

38. The Plaintiff realleges the allegations of paragraphs 1 through 37 of its complaint as fully set herein.

39. Hostar has a number of competitors in the United States and Canada that manufacture Hydraulic Boat Trailers.

40. Upon information and belief Hostar is the only manufacturer of Hydraulic Boat Trailers whose Hydraulic Boat Trailers have been deemed by the Internal Revenue Service to not qualify for exemption pursuant to Regulations 48.4061(d)(2)(i) and 48.4061(d)(2)(i).

41. Upon information and belief the Internal Revenue Service is aware of the name and location of manufacturers of

Hydraulic Boat Trailers, including a Canadian manufacturer, that represent to their customers that their Hydraulic Boat Trailers are not subject to Excise tax.

42. The assessment against Hostar was discriminatory and so unjustifiable as to be violative of due process.

WHEREFORE, the forgoing reasons, the Plaintiff prays this honorable Court for:

- a. Judgment against the Defendant, United States of America, plus statutory interest and an abatement of the assessment against them; and,
- b. Any and all other remedies that this honorable Court deems appropriate.

Trial by Jury

The Plaintiff requests a trial by jury.

Hostar Marine Transport
Systems, Inc., by its
attorney,

Timothy Burke
Burke & Associates
400 Washington Street
Braintree, MA 02184
(781)-380-0770

Dated: January 17, 2005

EXHIBIT 1

Internal Revenue Service
General Appeals Programs
Appeals Office
10 Causeway Street
Room 493
Boston, MA 02222

Department of the Treasury

Person to Contact:

Linda D Rolf
Employee ID Number: 04-55303
Tel: (617) 565-7981
Fax: 617-565-5472

Refer Reply to:

AP:G:BOS:LDR

In Re:

Excise

Tax Period(s) Ended:

03/1994 06/1994 06/1995 09/1995
12/1995 03/1996 06/1996 09/1996
12/1996

Claim Amount(s):

84,664.00

Date:

JAN 16 2005

Hostar Marine Transport Systems, Inc.
One Kendrick Rd
Wareham, MA 02571

Certified Mail

Dear Taxpayer:

We are sorry, but we cannot allow the above claim for an adjustment to your tax, for the following reasons:

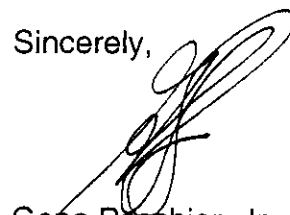
It is determined that the excise tax assessed in accordance with Section 4061(a) of the Internal Revenue Code is applicable. Accordingly, it is determined that the claim is disallowed in its' entirety.

Our decision is based on provisions of the Internal Revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or with the United States Court of Federal Claims. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of claim disallowance (Form 2297), the period for bringing suit began to run on the date you filed the waiver.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely,



Gene Peschier, Jr.
Appeals Team Manager

cc: Timothy J. Burke

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) Hostar Marine Transport Systems, Inc v. United States of America
2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).
- I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.
- II. 195, 368, 400, 440, 441-444, 540, 550, 625, 710, 720, 730, 740, 790, 791, 820, 830, 840, 850, 890, 892-894, 895, 950.
- III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- X IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
- V. 150, 152, 153.
3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(E)).
N/A
4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT?
N/A
5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? NO
IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY? (SEE 28 USC 2403) _____
6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC 2284? NO
7. DO ALL PARTIES IN THIS ACTION RESIDE IN THE CENTRAL SECTION OF THE DISTRICT OF MASSACHUSETTS (WORCESTER COUNTY) - (SEE LOCAL RULE 40.1(C)). YES _____ OR IN THE WESTERN SECTION (BERKSHIRE, FRANKLIN, HAMPDEN OR HAMPSHIRE COUNTIES)? - (SEE LOCAL RULE 40.1(D)). YES _____
8. DO ALL OF THE PARTIES RESIDING IN MASSACHUSETTS RESIDE IN THE CENTRAL AND/OR WESTERN SECTIONS OF THE DISTRICT? YES _____ (a) IF YES, IN WHICH SECTION DOES THE PLAINTIFF RESIDE? _____
9. IN WHICH SECTION DO THE ONLY PARTIES RESIDING IN MASSACHUSETTS RESIDE? PLYMOUTH COUNTY
10. IF ANY OF THE PARTIES ARE THE UNITED STATES, COMMONWEALTH OF MASSACHUSETTS, OR ANY GOVERNMENTAL AGENCY OF THE U.S.A. OR THE COMMONWEALTH, DO ALL OTHER PARTIES RESIDE IN THE CENTRAL SECTION _____ OR WESTERN SECTION _____

(PLEASE TYPE OR PRINT) Timothy J. Burke
ATTORNEY'S NAME _____

ADDRESS 400 Washington St. Suite 303 Braintree, MA 02184

TELEPHONE NO. (781) 380-0770

(Category.frm - 09/92)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS:

Hostar Marine Transport
Systems, Inc.(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Plymouth
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Timothy J. Burke (781) 380-0770
400 Washington St. Suite 303
Braintree, MA 02184

DEFENDANTS

United States of America: 02

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT PLAINTIFF COURT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

05 10111 DPW

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN:

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 116 Insurance <input type="checkbox"/> 128 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 162 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle-Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage-Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 861 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 665 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 635 Copyrights <input type="checkbox"/> 636 Patent <input type="checkbox"/> 640 Trademark SOCIAL SECURITY <input type="checkbox"/> 661 HIA (1305m) <input type="checkbox"/> 662 Black Lung (922) <input type="checkbox"/> 663 OWB/OWW (405(g)) <input type="checkbox"/> 664 SSD Title XVI <input type="checkbox"/> 665 RSI (405(g)) FEDERAL TAX SUITS <input checked="" type="checkbox"/> 670 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 671 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 510 Selective Service <input type="checkbox"/> 550 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 881 Agricultural Acts <input type="checkbox"/> 882 Economic Stabilization Act <input type="checkbox"/> 883 Environmental Matters <input type="checkbox"/> 884 Energy Allocation Act <input type="checkbox"/> 885 Freedom of Information Act <input type="checkbox"/> 886 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 888 Constitutionality of State Statutes <input type="checkbox"/> 889 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 446 Other Civil Rights PRISONER PETITIONS <input type="checkbox"/> 610 Motions to Vacate Sentence HABEAS CORPUS: <input type="checkbox"/> 630 General <input type="checkbox"/> 635 Death Penalty <input type="checkbox"/> 640 Mandamus & Other <input type="checkbox"/> 650 Civil Rights <input type="checkbox"/> 655 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 750 Other Labor Litigation <input type="checkbox"/> 761 Empl. Ret. Inc. Security Act		

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

Recovery of Internal Revenue Tax Erroneously collected .26 USCA § 7422

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
☐ UNDER F.R.C.P. 23

DEMAND \$:

271.11

CHECK YES only if demanded in complaint:

JURY DEMAND:

YES

NO

VIII. RELATED CASE(S) (See instructions):
IF ANY

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY:

RECEIPT #

AMOUNT

APPLYING FEE

JUDGE

MAG. JUDGE